No. 42529-7-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RUSSEL DAVID HOMAN,

Appellant.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ACLU OF WASHINGTON FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Cases from Other State Jurisdictions

Constitutional Provisions

Statutes

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly opposes laws and practices that infringe upon the free exchange of ideas and unlawfully restrict protected expression. The ACLU is particularly concerned with those statutes that impose criminal sanctions upon those who engage in protected speech. It has advocated for free speech and the First Amendment directly, and as *amicus curiae* at all levels of the state and federal court systems.

II. ISSUES PRESENTED

Whether Washington's "luring" statute is facially invalid because it is unconstitutionally overbroad.

III. STATEMENT OF THE CASE

Russell Homan was convicted of luring under RCW 9A.40.090 because, as he rode his bike past a 10 year old boy, he stated: "Do you want some candy? I've got some at my house." The Washington Supreme Court remanded to this Court with directions to review the constitutionality of RCW 9A.40.090. The Washington Supreme Court also suggested that the ACLU, along with other organizations, submit amicus briefs regarding the constitutionality of RCW 9A.40.090. *State v.*

Homan, 181 Wn.2d 102, 104 n.3, 330 P.3d 182 (2014).

IV. FACTUAL BACKGROUND

On August 4, 2010, in the town of Doty, Washington, a nine year-old boy, C.N.N., walked to the general store while thirty-seven year old David Homan rode a bicycle down the same road. *State v. Homan*, 172 Wn. App. 488, 489-90, 290 P.3d 1041 (2012). As Homan passed by C.C.N., and two other children, he said: "Do you want some candy? I've got some at my house." *Id.* Homan did not stop his bike or come within more than 10 feet of C.C.N., nor did Homan make any other attempts to get C.C.N.'s attention or to engage him further. *Id.* C.C.N. did not respond to Homan's statement. *Id.* Instead, C.C.N. continued walking down the street towards the store. *Id.* C.C.N. and Homan did not know each other personally. *Id.*

When C.C.N. returned home, he told his mother about the incident. *Id.* at 490. C.C.N.'s mother drove her son to town and when C.C.N. saw Homan, he identified him as the individual who asked if he wanted candy. *Id.* C.C.N.'s mother called the police. *Id.* Homan was arrested and charged with one count of luring. *Id.*

Under RCW 9A.40.090(1), a person is guilty of luring, if he or she:

> (a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public, or away

> from any area or structure constituting a bus terminal, airport terminal, or other transportation terminal, or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.

During trial, Homan moved for dismissal based on insufficiency of the evidence. *Homan*, 181 Wn.2d at 105. Homan's motion was denied and he was ultimately found guilty. *Id.* Homan appealed, challenging sufficiency of the evidence and also arguing that RCW 9A.40.090 is unconstitutionally overbroad. *Id.* This Court did not reach Homan's overbreadth arguments. *Id.* Instead, it reversed Homan's conviction on the basis that the evidence presented at trial was insufficient to support a conviction under RCW 9A.40.090. *Id.* The State filed a timely appeal and the Washington Supreme Court granted review. *Id.* The Washington Supreme Court held that there was sufficient evidence to convict Homan under RCW 9A.40.090. *Id.* at 110-11. However, the Washington Supreme Court did not rule on Homan's constitutional challenge to RCW 9A.40.090, leaving it to be addressed by this Court in the first instance, with the benefit of further briefing. *Id.*

V. ARGUMENT

It is well established that the government cannot ordinarily restrict speech because of its message, ideas, subject matter, or content. U.S. Const. amend. I; *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700 (2002). This limitation is not absolute. *Id.* The First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). These "historic and traditional categories . . . [are] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct [and] are well-defined and narrowly limited classes of speech . . . ." *Id.* (internal quotation marks omitted). Outside of these narrow and well-recognized categories of unprotected speech, the government faces a steep challenge in justifying laws that criminalize expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Here, there is no dispute as to whether the statute targets a category of unprotected speech. It does not. Accordingly, the statute can only withstand First Amendment scrutiny to the extent that it is narrowly tailored and does not criminalize protected speech.

A. RCW 9A.40.090 Is Unconstitutionally Overbroad

The overbreadth doctrine is aimed at preventing government proscriptions that have a chilling effect on constitutionally protected speech. *Immelt*, 173 Wn.2d at 8 (citing *Virginia v. Hicks*, 539 U.S. 113, 115-16, 123 S. Ct. 2191 (2003)). *See also State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). It reflects courts' judgment that the First Amendment's interest in preventing a chilling effect outweighs "the possible harm to society in permitting some unprotected speech to go unpunished." *Broadrick*, 413 U.S. at 612. A statute targeting speech is overbroad if it "sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct." *Immelt*, 173 Wn.2d at 6 (citing *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992)). When determining whether a statute is overbroad, courts give criminal statutes "particular scrutiny," and will invalidate these statutes if they criminalize substantial amounts of protected speech even though the law may address a legitimate state interest. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). To defeat an overbreadth challenge, the State must show that a compelling interest exists and that the law is narrowly tailored to avoid criminalizing substantial amounts of protected speech. *Id.* Absent such a showing, the law will not withstand First

Amendment scrutiny. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

RCW 9A.40.090 is not narrowly tailored to achieve the State's interest in protecting children and vulnerable adults for two reasons: (1) the statute does not require criminal intent or conduct as an element of proof of criminal liability and instead allows the state to prove a violation of RCW 9A.40.090 based on pure speech alone; and (2) the statute does not define "luring" sufficiently to ensure that pure speech or innocent acts are not criminalized.

1. Without a Requirement of Criminal Intent and Conduct RCW 9A.40.090 Is Unconstitutionally Overbroad

Courts have required criminal luring statutes to include intent, conduct, or some other limiting principle to ensure that more than just pure speech is required to be the basis of a criminal conviction. *See Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1209-13 (9th Cir. 2010) (invalidating Oregon's luring statute because it reached substantial amounts of constitutionally protected speech); *State v. Romage*, 138 Ohio St.3d 390, 393-94, 7 N.E.3d 1156 (2014) (striking down Ohio's luring statute as unconstitutionally overbroad because it did not require criminal intent to accompany the allegedly criminal communication). These decisions affirm the general principle that statutes attempting to

criminalize pure speech must have an element of criminal intent or conduct to avoid penalizing constitutionally protected speech. *See State v. Williams*, 171 Wn.2d 474, 485-86, 251 P.3d 877 (2011) (upholding a "jurisprudential history of requiring conduct in addition to pure speech in order to establish obstruction of an officer"); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (upholding a federal coercion and enticement statute because it only applied to those who "knowingly" persuade or entice minors)..

Romage is instructive. 138 Ohio St.3d 390. In *Romage*, the Ohio State Supreme Court struck down Ohio's luring statute, which was drawn more narrowly than RCW 9A.40.090. *Id.* at 394-95. The court found that, although the state had an interest in protecting minors, a statute that "prohibits anyone from asking any child to accompany the person in any manner for any reason" was so broad that it could "support criminal charges against a person in many innocent scenarios." *Id.* The court specifically identified the lack of a criminal intent or intimidation tactics as exacerbating the overbreadth concerns. *Id.*

Even in cases not concerning luring statutes, courts have found overbreadth where statutes criminalize activity closely connected to free speech when statutes fail to include a limiting principle (i.e. conduct or criminal intent). *See State v. Williams*, 171 Wn.2d 474, 485-86, 251 P.3d

877 (2011) (reaffirming the constitutional requirement of conduct to support a conviction for obstruction); *State v. Pauling*, 149 Wn.2d 381, 389, 69 P.3d 331 (2003) (reaffirming the constitutional need for a "wrongfulness element" or criminal intent without which the state is not allowed to prosecute). These decisions hinge on the court's concern that, without requiring criminal intent or conduct to support a conviction, there is no assurance that the statutes will not be used to criminalize pure speech.

Similar to the deficient statutes discussed above, RCW 9A.40.090 fails to require either criminal intent or conduct, and as such, lacks a limiting principle necessary to ensure that it criminalizes only the narrow category of speech the state has a compelling in proscribing (i.e., where someone intends to engage in criminal behavior with a minor and actually acts on this intent). Indeed, the Washington Supreme Court has expressly held that under RCW 9A.40.090's articulation of luring one can violate RCW 9A.40.090 without criminal intent and without criminal conduct. *See Homan*, 181 Wn.2d 102, 107-08, 330 P.3d 182 (2014). The lack of a criminal intent or conduct requirement causes RCW 9A.40.090 to be overbroad and to penalize speech that is well outside of the legitimate sweep of that statute.

2. RCW 9A.40.090's Vague Definition of "Luring" Exacerbates the Statute's First Amendment Problems

RCW 9A.40.090 provides no definition for what constitutes luring, and this failure to provide a specific, narrow definition also contributes to RCW 9A.40.090's overbreadth. When the legislature fails to define a statutory term and the language is clear and unambiguous, courts must give effect to term's plain meaning. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Courts often derive the common understanding of a statutory term by looking at dictionaries. *Homan*, 181 Wn.2d at 108.

The Washington Supreme Court relied upon Webster's Third New International Dictionary to define the key terms of RCW 9A.40.090. *Id.*(defining "lure" as enticement and "order" as command or to give orders). Defining "lure" as enticement implies a dubious intent on the part of the speaker. But such a vague notion of dubious, but not criminal, intent (which, in any event, has not been read into the statute) does not help draw a line between speech that may be proscribed and speech that is innocent. A person outside a restaurant who entices potential patrons may be "luring" them inside by the promise of the dish of the day, or a retail store clerk may lure a minor into the store to check out the latest toys on sale, but this is hardly the type of speech the statute meant to penalize. But it is speech that is criminalized by the statute as it is written. The

State cannot point to anything in the statute that actually renders these types of speech non-criminal. We are left in the end to rely on the largesse of prosecutors, but this notion has been repeatedly rejected in the First Amendment context. *Stevens*, 559 U.S. at 480 (holding that "the First Amendment protects against the Government; it does no leave us at the mercy of *noblesse oblige*"). *See also Powell's Books*, 622 F.3d at 1215 (declaring that "although we appreciate the state's argument that it has not, and will not, bring prosecutions against individuals or businesses like Powell's Books, this stand down approach cannot overcome the flaws in the statute"). Indeed, the United States Supreme Court declared that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. *Id.* (citing *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 473, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)).

All that that statutory language requires to constitute the crime of luring is that a person entices a minor or developmentally disabled person. This can be achieved by simply communicating in a manner that appeals to a minor or developmentally disabled person. As the term "lure" without any requirement of criminal intent or conduct there are many constitutionally protected and even highly socially valuable communications with minors and developmentally disabled individuals

that would constitute child luring under RCW 9A.40.090. This results in RCW 9A.40.090 criminalizing speech that in no way invokes any legitimate state interest justifying the restriction of constitutionally protected speech. As the definition of "luring" is broader than the activities the state has a legitimate interest in criminalizing, the statute criminalizes substantial amounts of protected speech and must be struck down as overbroad. *See State v. Immelt*, 173 Wn.2d at 12; *State v. Pauling*, 149 Wn.2d at 386. *See also United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (striking down statute that attempted to criminalize transactions involving depictions of animal cruelty but instead criminalized transaction involving all depictions of "living animals [that were] intentionally maimed, mutilated, tortured, wounded, or killed" even though animals are often humanely killed or wounded in a myriad of ways that do not rise to the level of cruelty).

3. RCW 9A.40.090 Criminalizes a Wide Range of Innocent Conduct

RCW 9A.40.090 criminalizes communications with a minor or developmentally disabled adult that seeks to have the listener move to another location that may be obscured from the public eye even where there is no criminal intent, criminal conduct, and when such speech is not part of a criminal scheme. RCW 9A.40.090(1)(a); *Homan*, 181 Wn.2d at

107-08. Because RCW 9A.40.090 fails to require something beyond pure speech to sustain criminal liability it sweeps into its ambit large swathes of protected speech. For example:

> A person would run afoul of RCW 9A.40.090 if she encountered a lost child at the Temple of Justice and directed that child to an administrative office, which is a place that is generally inaccessible to the public, and told the child that the person in the office will give them a cup of hot chocolate once they arrive. RCW 9A.40.090 would similarly be violated by a person directing the same lost child to the Capitol Building rotunda, where the child was told she would receive a pin with the Washington State seal on it, if that child had to pass through a hallway or an empty office to get there.
>
> A retail store clerk could violate the statute by asking a wandering child to come inside her store and check out the latest toys on sale.
>
> A responsible and compassionate person would violate RCW 9A.40.090 if, after witnessing an unknown, developmentally disabled person being bullied, the person directed the developmentally disabled person to a safe place where he was told he could watch his favorite movie until his guardian arrived.
>
> A librarian violates RCW 9A.40.090 each time he directs a minor to take the elevator to the floor of the library to locate a book the young person is excited about finally reading.

In fact, the statute does not even require that the speech be physically feasible or direct the putative victim to a real location. A person could violate the statute by using hyperbole, for example by telling a child or vulnerable person to "take a long hike off of a short pier," to "go

to the moon," or any other hyperbolic statement ordering the person to an "area or structure that is obscured from or inaccessible to the public." RCW 9A.40.090.

Indeed, RCW 9A.40.090 is so overly broad that it criminalizes not just innocuous speech but even speech that is meant to ensure that young people are protected and safe. On its face, RCW 9A.40.090 criminalizes offers of assistance and guidance to children and developmentally disabled persons without even an exception for law enforcement or emergency personnel, such that even when such a person directs a child to another location as part of their employment in an attempt to protect them, or even in an emergency situation, that person will have violated RCW 9A.40.090.

B. The State's Legitimate Interest Does Not Justify The Criminalization of Substantial Amounts Of Protected Speech

The Statemay rely on its interest in protecting children, but while surely compelling, this interest does not translate into a license to ignore the strictures of the First Amendment. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875, 117 S. Ct. 2329 (1997). In *Reno*, the United States Supreme Court invalidated two provisions of the Federal Communications Decency Act because it placed an "unacceptably heavy burden on protected speech." *Id.* at 844. The government argued that the two provisions were necessary because they intended to protect minors from

indecent and patently offensive communications on the internet. *Id.* at 849. The Court did not find that argument persuasive and instead held that, even though the government had a legitimate interest in protecting children, such an interest did not justify the unnecessary and overly broad suppression of individuals' constitutionally protected speech. *Id.* at 875.

Similarly, when the Ohio State Supreme Court struck down its luring statute, it reaffirmed that "protection of members of the public from sexual predators and habitual sex offenders is a paramount governmental interest" and that "the safety and general welfare of children is even more deserving of governmental protection." *Romage*, 138 Ohio St. 3d at 393. However, even though the court recognized the compelling governmental interest in protecting children, it rejected the government's argument that the burden on free speech was a necessary evil to protect children. *Id.* Instead, the court held that "[e]ven though the state has a legitimate and compelling interest in protecting children from abduction and lewd acts, a statute intended to promote legitimate goals that can be regularly and improperly applied to prohibit protected expression and activity is unconstitutionally overbroad." *Id.*

The Ninth Circuit followed suit in *Powell's Books, Inc. v. Kroger*, when it invalidated a pair of overly broad Oregon statutes. 622 F.3d at 1212. The Oregon legislature enacted the two statutes to curb the

exposure of minors to hardcore pornography. *Id.* Despite the legitimate state interest in protecting minors from certain types of material that may not satisfy the specific definition of "obscenity," the Ninth Circuit noted that the statutes in question "sweep up material that, when taken as a whole, has serious literary, artistic, political, or scientific value for minors and thus also has at least some 'redeeming social value.'" *Id.* at 1214.[1]

These cases are instructive to the Court's decision here. Even if the Court assumes that RCW 9A.40.090's legitimate sweep is "the protection of minors under sixteen and the developmentally disabled," from predatory situations, this interest is overshadowed by the significant burden an impermissibly broad statute imposes on protected speech. *State v. Dana*, 84 Wn. App. 166, 175, 926 P.2d 344 (1996). As in *Reno*, *Romage*, and *Powell's Books*, the statute here seeks to protect children but, because it does not have a limiting principle (criminal intent or conduct requirement). Nor does it employ a narrow definition of luring. Accordingly, it sweeps substantial amounts of constitutionally protected speech into its ambit. Thus, regardless of the state's interest RCW 9A.40.090 is such an overly broad statute that it cannot withstand a First Amendment challenge.

[1] Further problematic was the fact that the statutes were not narrowly constructed to limit culpability to material that the state had a legitimate interest in limiting minors' access to: material that "predominantly appeals to minors' prurient interest." *Powell's Books*, 622 F.3d at 1214.

C. There Is No Remedy To RCW 9A.40.090's Overbreadth

Neither an affirmative defense nor a narrow construction remedies the serious constitutional concerns caused by RCW 9A.40.090's overbreadth.

1. An Affirmative Defense Does not Save an Overly Broad Statute

RCW 9A.40.090 includes an affirmative defense that allows a defendant the opportunity to "prove by a preponderance of evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability." RCW 9.40.090(b)(2). However, RCW 9A.40.090's affirmative defense does not cure it of its overbreadth.

Courts are skeptical of legislative attempts to cure First Amendment overbreadth through the inclusion of affirmative defenses in a statute. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 674, 124 S. Ct. 2783, 2796, 159 L. Ed. 2d 690 (2004). This is because an affirmative defense does nothing to alleviate the chilling effect on speakers that arises from the threat of criminal sanctions. *Id.* at 671. "Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial." *Id.* Further,

affirmative defenses burden those engaged in protected speech because the defense only applies after "prosecution has begun, and the speaker must himself prove . . . that his conduct falls within the affirmative defense." *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 193 (3d Cir. 2008) (internal quotation marks omitted).

Affirmative defenses neither remedy constitutional issues in statutes that unlawfully infringe upon free speech nor do not resuscitate statutes that contravene the First Amendment. Indeed, when the Washington Supreme Court invalidated Washington's second degree unlawful possession of a firearm statute, because it did not include a *mens rea* element, the Court noted that even though there was an affirmative defense, the affirmative defense did not cure the statute's problems. *State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

2. RCW 9A.40.090 Cannot Be Narrowly Construed to Address the First Amendment Concerns

Even if a court finds that a statute is "substantially overbroad," it can save the statute by narrowing its construction. *State v. Halstien*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993). Courts have an obligation to make this attempt. *Id.* However, in limiting the construction of an overbroad statute, courts cannot insert "missing terms into the statute or adopt an interpretation precluded by the plain language of the statute." *Powell's*

Books, Inc. v. Kroger, 622 F.3d 1202, 1215 (9th Cir. 2010) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998)). In other words, courts cannot rewrite laws to ensure that they are constitutional. *Id.* And, indeed, it is not always possible to narrow a statute in order to cure its First Amendment problems. *See Immelt*, 173 Wn.2d at 13 (holding that the horn honking ordinance in question gave the Court no basis to construe the ordinance as only proscribing unprotected conduct); *Romage*, 138 Ohio St. 3d 390 at 394 (refusing to narrow the construction because "[t]he common, ordinary meaning of the word 'solicit' encompasses 'merely asking'") (citations omitted); *Stevens*, 559 U.S. at 478 (refusing "to narrow the statute in question because it required "an unrealistically broad reading of the [statute's] exception clause").

Indeed, previously attempts to adopt a narrowing construction to RCW 9A.40.090 have failed. *Dana*, 84 Wn. App. at 175. The *Dana* court construed RCW 9A.40.090 to encompass an invitation that includes "some other enticement or conduct constituting an enticement (or attempted enticement)." *Id.* at 175. However, on discretionary review, the Washington Supreme Court, rejected the narrowing construction of "luring" articulated in *Dana* and held that no intent or conduct was necessary to be criminally sanctioned under the plain language of RCW 9A.40.090. *Homan*, 181 Wn.2d at 108. Thus a narrower construction of

the statute, which might impose an intent or conduct requirement, is foreclosed.

Moreover, RCW 9A.40.090's plain language forecloses the possibility of adding an intent and conduct element to the statute. The statute is clear, and the Washington Supreme Court has agreed, that "words alone" are all that is required to support a conviction under the plain language of RCW 9A.40.090. *Homan*, 181 Wn.2d at 108. *See also* RCW 9A.40.090. Any attempt to add intent and conduct to the statute would be tantamount to a wholesale rewrite the statute. This oversteps the bounds of judicial authority, and is prohibited under *Powell's Books*. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010). As a result, RCW 9A.40.090's overbreadth cannot be resolved by a narrowing construction and instead the statute must be deemed unconstitutional..

VI. CONCLUSION

For the foregoing reasons RCW 9A.40.090 is unconstitutionally overbroad and should be deemed unconstitutional.

Respectfully submitted this 25th day of November 2014.

BY: ACLU OF WASHINGTON FOUNDATION

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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

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DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the Brief of Amicus Curiae American Civil Liberties Union of Washington via email and submission to the Division II JIS Lnk system to the following addresses:

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ACLU OF WASHINGTON

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